

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ANITA JUNE EADS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>TEMPORARY EMPLOYMENT CORP.</b>	)	
Respondent	)	Docket No. 1,026,439
	)	
AND	)	
	)	
<b>CONTINENTAL CASUALTY CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and insurance carrier request review of the March 6, 2007 Award by Administrative Law Judge Kenneth J. Hursh. Both parties submitted briefs and the case was placed on the Board's summary docket on May 25, 2007, for decision without oral argument.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record, the parties' briefs and adopted the stipulations listed in the Award.

**ISSUES**

The parties agreed claimant suffered a compensable work-related scheduled injury to her right leg. But the nature and extent of her injury was disputed. The treating physician, Dr. J. Timothy Ogden, concluded claimant had a 0 percent permanent partial

functional impairment. Dr. Ogden admitted he used the Fifth Edition of the *AMA Guides*<sup>1</sup> to arrive at his functional impairment rating but he noted his rating would be the same under the Fourth Edition. Conversely, Dr. Prostic opined that pursuant to the Fourth Edition of the *AMA Guides* the claimant suffered a 15 percent permanent partial functional impairment to the right leg. The Administrative Law Judge (ALJ) determined claimant suffered a 15 percent permanent partial functional impairment to the leg based upon Dr. Prostic's opinion and rating. The ALJ concluded Dr. Prostic's opinion was more clearly based upon the statutorily mandated Fourth Edition.

The respondent requested review of the nature and extent of claimant's disability. Respondent argues the treating physician's opinion and rating should be adopted and therefore claimant would have a 0 percent rating to the leg. Respondent further argues that although Dr. Ogden rated claimant using the Fifth Edition of the *AMA Guides* he explained that the rating would be the same using the Fourth Edition.

Claimant argues that Dr. Ogden used the Fifth Edition of the *AMA Guides* to determine his rating and neither consulted the statutorily mandated Fourth Edition nor explained what section of that edition he would have consulted. Consequently, claimant argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's scheduled injury to the leg.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant was an employee of respondent, a temporary employment service. She was placed in a job with Labconco working as a cabinet builder. She had worked there for about seven weeks, when on September 8, 2005, as she was stepping off a fork lift she twisted and felt a snap in her right knee. She notified both her supervisor at Labconco and Manpower. She was referred to Mt. Carmel Occupational Health in Pittsburg, Kansas, for medical treatment. Dr. Augusto Ramirez ordered x-rays, prescribed some medication for pain and a knee immobilizer as well as crutches. Apparently, no additional treatment was provided at that time.

Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at her attorney's request. On December 27, 2005, Dr. Prostic took a history from

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant and performed a physical examination. Claimant's right knee was tender about the medial aspect of the knee, mild valgus laxity with only one plus anterior laxity, and anterior crepitus during flexion and extension of the knee. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of her work-related injury. Dr. Prostic diagnosed the claimant with a partial thickness tearing of the anterior cruciate ligament and possible torn medial meniscus. The doctor recommended an MRI and possible surgery.

The claimant then scheduled a preliminary hearing in order to obtain the recommended additional medical treatment. On January 18, 2006, the ALJ issued an Order which stated that no record was made of the preliminary hearing but based upon statements of counsel the respondent was ordered to provide claimant with the services of Dr. J. Timothy Ogden for examination and treatment, if necessary.

Dr. Ogden, board certified orthopedic surgeon, examined, evaluated and began treatment of claimant on February 28, 2006. Ultimately, Dr. Ogden performed an arthroscopic resection of a plica and chondroplasty on March 29, 2006. The doctor prescribed physical therapy. Dr. Ogden's final diagnosis of claimant's right knee condition was pes anserine bursitis, which is an inflammation of bursa where the hamstring tendons attach to the tibia, chondromalacia, which is wear and tear on the articular cartilage of the medial femoral condyle and plica syndrome, which is an inflammation of the synovium beneath the patella of the right knee. Claimant developed pes anserine bursitis for which she received two injections. And when claimant was released from treatment it was recommended that she continue ice and heat therapy as well anti-inflammatory medication for recurrent pain.

Claimant was off work from March 29, 2006, through May 23, 2006, when she was released by Dr. Ogden. The doctor determined claimant had reached maximum medical improvement on May 23, 2006, and released her without any permanent restrictions. On July 12, 2006, Dr. Ogden rated the claimant's right knee. The doctor testified:

Q. Doctor, I noticed in the impairment rating section of the first document of Exhibit 2, the letter dated July 12th, 2006, you indicate that you used the 5th Edition AMA guides to the evaluation of permanent impairment and you based your opinions concerning that 0 percent on that 5th Edition; is that correct.

A. Yes, that's correct.

Q. Are you familiar with the 4th Edition as well?

A. Yes, I am.

Q. Similar to the 5th Edition?

A. Right. It would be no difference.

Q. So your opinions, had they been based on the 4th Edition, would not change at all. Is that a fair statement?

A. Right. It would be exactly the same.

Q. Zero percent?

A. Correct.<sup>2</sup>

Dr. Ogden admitted that when he was rating claimant he only looked at the Fifth Edition of the *AMA Guides*. The doctor noted that his rating was primarily based upon range of motion. And the doctor noted claimant had full range of motion at her last office visit. The doctor further noted that claimant did not have a meniscal tear nor removal of cartilage for which the *AMA Guides* provide some percentage of impairment.

Claimant testified she has pain on both sides of her knee as well as difficulty squatting, kneeling, and climbing stairs. Her knee has given out on her and at times she still experiences some swelling in the knee.

On August 14, 2006, claimant was again examined and evaluated by Dr. Prostin due to complaints of intermittent pain on either side of her right knee, worsening with progressive standing or walking, difficulty going up and down stairs or attempting to squat or kneel. Claimant continues to have swelling, clicking, popping, giving away and pseudolocking as well as sensitivity to inclement weather. Additional x-rays were taken which indicated mild medial joint space narrowing, neutral alignment of the leg and some lateral facet overhang of the patella. Dr. Prostin's physical examination revealed that range of motion was complete with good stability but there was anterior crepitus during flexion and extension as well as tenderness at the origin of the patellar tendon. Claimant was able to walk on her toes and her heels as well as squat completely.

Dr. Prostin diagnosed claimant with osteoarthritis of her knee which was aggravated by her work-related injury. Based upon the *AMA Guides*, Dr. Prostin opined claimant has a 15 percent permanent partial functional impairment to her lower extremity.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.<sup>3</sup>

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<sup>2</sup> Ogden Depo. at 9.

<sup>3</sup> K.S.A. 44-510e(a).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>4</sup>

Although Dr. Ogden testified that his rating would be the same under the Fourth Edition, there is no evidence in the record comparing the methodology for rating a knee under the Fourth Edition versus the Fifth Edition. The ALJ recognized that Dr. Ogden testified that his rating would remain the same utilizing the Fourth Edition but concluded that Dr. Prostic's opinion was more clearly based upon the statutorily mandated Fourth Edition. The Board agrees and affirms. Moreover, in this instance the rating provided by Dr. Prostic appears to more accurately consider the fact that claimant continues to have significant problems with her right knee.

#### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 6, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge

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<sup>4</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).